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THE IMPACT OF LEGAL DECISIONS ON THE FUTURE OF EDUCATION

by Larry Freeman

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TOPIC: *The Impact of Legal Decisions on the Future of Education*

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*Asterisk indicates major descriptor.

In order to provide a backdrop to a discussion of some of the possible effects that legal developments may have on the future of education, the following statements of the idealogies that have motivated our thinking about education are offered. The first appears in Holmes' *Rural Sociology: The Farm Family Institution* (1932). While this statement does not bear directly on education, its educational implications are obvious:

> Backward communities and groups, rural and urban, need not be made more happy; they need rather, for the sake of progress, to be freed from their backward communities. The condition of backwardness consists essentially in narrowness of outlook due to a limited range of suggestions, brought about, in turn, by a high degree of isolation from the general current of human thought. A legitimate and constructive aim of social reform is to break through such walls of isolation, wherever they may be found, carrying to those within as large a fund of ideas as may be made availalble. This will not in general increase happiness, but it will bring an increase in richness of human experience. . . . From the standpoint of the larger society, the freeing of backward groups from their backwardness results in an increase of efficiency through bringing more individuals into effective service of the whole. From the standpoint of the individual who experiences this change, it means a more abundant life, which he may or may not think of as involving a net increase of happiness.[1]

The second statement explicitly concerns education and appears in Cartter's article, "University Teaching and Excellence."

> As higher education continues to expand, a large proportion of the students who come to us are without the family and community background which would provide them with intellectual curiosity and a strong moral sense. We are expected to give them a purpose to live for and standards to live by, to encourage those attributes of being which are associated with the cultured gentleman . . ."[2]

The final statement occurs in the *Byrd* v. *Begley* court opinion of 1936:

> . . . we are self-governing people, and an education prepares the boys and girls for the duties and obligations of citizenship. Neither the schools nor the state can carry on without rules or laws regulating the conduct of the student or citizen, and those who are taught obedience to the rules and regulations of the school will be less apt to violate the laws of the state.[3]

The educational idealogies expressed in these three statements have informed the actions of those responsible for educational policy making in the United States. Generically, they might be regarded as variants

of the melting pot idealogy that has increasingly come under attack. My purpose here is to outline several legal grounds on which this idealogy has been and will be challenged and to spell out some of the implications of successful challenges.

Certainly, the melting pot idealogy provided the states with the impetus to find it in their interest both to compel children to attend school and to prevent them from working. At the same time, through the exercise of its police powers, each of the states has developed a system for selecting and licensing those entrusted with the education of the state's young. A complex web of issues has arisen from these interrelated state actions. In other instances, the state has sought, at least in theory, to protect the public interest through occupational and professional licensing, but in no other situation, other than legal declaration of insanity or commission of a crime, is an individual compelled to use the services of one or more specifically licensed practitioners. Short of extraordinary circumstances or an unprecedented and successful habeas corpus action, a child must attend school. One would expect that this would result in extremely rigorous processes for designating and licensing of teachers. Not only is protection of the public interest at stake but also a powerful state interest.

Rationale for Licensing Procedures

The state's exercise of its police power in licensing teachers is "legitimate, moral, and rational, only to the extent that teacher certification protects and promotes some demonstrably legitimate public interest of the people for whose welfare and benefit state accredited schools are established."[4] More specifically, one would expect that in protecting and promoting that interest, the licensing of teachers would be based on demonstrated competency, both general competency and competency to assist in the intellectual, emotional, and/or vocational growth and development of a child in a specific neighborhood and culture. One would not expect that the state would seek to protect its interest by relying on mere completion of an approved program of training. Given the state's interest in educating its citizens, one would expect, in short, that the licensing of teachers would demonstrate the state's interest. Minimally, one would expect the following:

1. That detailed, rather than highly generalized, descriptions of what the job of teaching constitutes would be provided;

2. That the assessment of candidates for licensing would be conducted in terms of such job description; and

3. That the assessment of educational personnel would be recurrent and conducted in terms of the original, or evolving, job descriptions.

As we all know, this is not typically the case. At best, present teacher licensing procedures can claim something approaching content validity, resulting from subjective comparisons between prior education and experience (and in some instances test results) and a specific job, the nature of which is either generally unknown or largely undescribed.

Interpretation of Title VII

It is in this context that Title VII of the Civil Rights Act of 1964 and its subsequent amendment become important and provide the bases for challenging the melting pot idealogy that has motivated our general educational policies, including teacher credentialling. Title VII originally offered protection from various forms of discriminatory employment practices in private enterprise and, by amendment, provided the same protections from discriminatory practices of state and local governmental agencies, including schools and colleges. As the result of litigation to seek enforcement of Title VII, the Supreme Court in *Griggs* v. *Duke Power Company* held that the procedures in assessing prospective employees or present employees for promotion must be *neutral* with respect to factors such as test scores and educational background, *except* when the results of tests or educational background have a manifest relationship to performance on the job.[5]

The Equal Employment Opportunity Commission's Guidelines for Employee Selection, cited approvingly by the court in *Griggs*, provide three ways of validating selection criteria: content, construct, and predictive validation.[6] Essentially, content validation involves the demonstration of a rational relationship between the criteria--as in the content of a test or an educational program--and the job. Construct validation seeks a rational relationship between personal attributes and the job requirements. Predictive validation, the most preferred of the three forms of validation, involves demonstrating that the on-the-job performance of groups selected according to stated criteria is superior to that of a randomly selected group.

When one looks at the teaching profession it becomes apparent that present employee selection procedures in educational institutions are suspect. The response of the American Council on Education is suggestive; its Task Force on Equal Employment is preparing documentation intended to show that the Ph.D. is a *bona fide* employment criteria.

Recent and current Title VII litigation with respect to teacher licensing and employment practices has been brought against specific school boards, particularly in connection with the use of allegedly non-job-related tests. It is important, however, to realize that the Equal Employment Opportunities Commission and the Supreme Court have

so interpreted the legislative intent of Title VII as to include more than use of unvalidated tests. Sheila Huff, in an uncirculated paper on the educational implications of Title VII, notes that *"specific educational requirements* are also included in the [EEOC] definition of the term 'test'."[8]

The Supreme Court in *Griggs* is more explicit:

> The facts of this case demonstrate the inadequacy of broad and general testing devices as well as the infirmity of using diplomas or degrees as fixed measures of capability. . . . diplomas and tests are useful servants, but Congress has mandated the commonsense proposition that they are not to become masters of reality.[9]

And though recent litigation has named only individual employers as defendants, Shimberg and his colleagues in *Occupational Licensing: Practices and Policies* anticipate that "the social and legal pressures that have heretofore been placed on private employers to use fair employment practices may now be expected to be exerted with equal or greater forces on licensing boards and other public agencies."[10] Although the courts are likely to take the position that the EEOC guidelines "must not be interpreted or applied so rigidly as to cease functioning as a guide and become an absolute mandate or prescription,"[11] it is equally clear that overreliance on minimal content or construct validity in licensing and employing of teachers will be challenged.

Effect on Licensing Procedures

What this suggests is that the licensing, hiring, and promotion of educational personnel will be considerably reshaped, either voluntarily or under court order. Several efforts have been made to create new programs to prepare educational personnel and to assess candidates for licensure. Generally, they are known as competency- or performance-based systems. These systems, however, may not be the adequate solution that some of their advocates claim. Robinson's commentary on the report, *The Power of Competency-Based Teacher Education* is instructive.[12] He argues that the preferred and more rigorous criterion-referenced or predictive validation of teacher education and licensing requires that validity be established not only in terms of the effects of a teacher education program on the competencies of a prospective teacher but in terms of the effects of the teacher on student achievement and well-being. Robinson proposes a two-prong test of the validity of teacher licensing practices: (a) the general competence of the candidate in some field or area and (b) the effect of the teacher on the student. The latter test is of particular interest since it requires the development of "a principle of benign effect."

A policy statement adopted by the Executive Committee of the Conference on College Composition and Communication in the spring

of 1972 defined this principle as follows:

> We affirm the student's right to his own language--the dialect of his nurture in which he finds his identity and style. Any claim that only one dialect is acceptable should be viewed as attempts of one social group to exert its dominance over another, not as either true or sound advice to speakers and writers, nor as moral advice to human beings. A nation which is proud of its diverse heritage and of its cultural and racial variety ought to preserve its heritage of dialects. We affirm strongly the need for teachers to have such training as will enable them to support this goal of diversity and this right of the student to his own language.[13]

Recent Court Opinions

This statement may serve to initiate our consideration of what a principle of benign effect might look like, particularly since it implicitly formulates a principle of *neutrality* with respect to language. The statement calls upon teachers, administrators, and others not to deny to students their language nor to disparage the language or dialect of any student.

In this context, the recent Supreme Court decision in *Lau* v. *Nicholas* is helpful. The petitioners who were representative of 1,800 other non-English-speaking Chinese people in San Francisco, sought to require the state of California and the San Francisco Unified School District to provide instruction permitting them to comprehend and benefit from classes taught exclusively in English.[14] The lower court had held that "these Chinese-speaking students--by receiving the same education made available upon the same terms and conditions to the other tens of thousands of students in . . . the District--are legally receiving all their rights to an education and to equal educational opportunities."[15] Though it avoided constitutional questions, the Supreme Court overruled the lower court and held that the state and the San Francisco schools must provide the kind of instruction sought by the petitioners.

This decision appears to increase substantially the significance of an earlier Texas district court memorandum opinion. In the aftermath of a decision forcing desegregation of the San Felipe-Del Rio Consolidated Independent School District in Texas, Judge William Wayne Justice provided a memorandum clarifying the earlier court order. In the course of this memorandum he acknowledges being particularly impressed by the testimony of Jose Cardenas regarding "cultural incompatibilities" which generally prevent Mexican-American students from being able to "benefit from an educational program designed primarily to meet the needs of so-called Anglo-Americans!" [16] Subsequently, Judge Justice writes that "under the circumstances here . . . little could be more clear to the court than the need . . . for special educational consideration to be given to the Mexican-American students in assisting them in adjusting

to those parts of their new school environment which present a cultural and linguistic shock. Equally clear, however, is the need to avoid creation of a stigma of inferiority as to 'the badges and indicia of slavery' spoken of in United States vs. Jefferson County Board of Education. To avoid this result, the Anglo-American students too must be called upon to adjust to their Mexican-American classmates, and to learn to understand and appreciate their different linguistic and cultural attributes."[16]

Both the decision in *Lau* and the Texas opinion have clear consequences for the certification and employment of teachers. These findings, together with the application of the EEOC guidelines (and a modicum of reason), require that in the schools attended by students whose linguistic and cultural attributes are not those of the dominant cultures, the teachers must be fluent in the relevant non-English language(s) and should, if possible, be bearers of the student's culture. It is impossible to conceive of how a teacher can have a benign effect on a student's achievement and well-being if he or she does not speak the only language possessed by the child.

The significance of these cases and of their implications for the licensing and employment of educational personnel is not limited to Texas or San Francisco. In 1968 it was estimated that some three million children were speaking non-English languages as their native tongue, that 75-80 percent of all black children of school age use a southern rural or northern urban English dialect, and that approximately six million American children "are taught by people who 'do not know their language'."[17]

But languages and dialects do not exist in vacuums. Attached to language and dialect are other cultural patterns--cognitive, affective, gestural, kinesic, and social. The question we must ask is whether our schools can continue to pursue a melting pot ideology and simultaneously enable teachers and other educational personnel benignly to affect students. The Supreme Court has apparently ruled that the schools cannot, in the decision in *Wisconsin* v. *Yoder*.[18] In this case, the court exempted Amish children from Wisconsin's state law compelling attendance at school after completion of the eighth grade. The decision was grounded rather narrowly on the "free exercise" clause of the First Amendment. What is intriguing, however, is that the Court found it necessary to balance state interest and individual rights and in doing so found the testimony of Donald A. Erickson persuasive:

> [He] . . . testified that their system of learning-by-doing was an "ideal system" of education in terms of preparing Amish children for life as adults in the Amish community. . . . As he put it, "These people aren't purporting to be learned people, and it seems to me that the self-sufficiency of the community is the best evidence I can point to . . ."[19]

Subsequently, the court writes:

> Insofar as the State's claim rests on the view that a brief additional period of formal education is imperative to enable the Amish to participate effectively and intelligently in our democratic process, it must fall. The Amish alternative to formal secondary school education has enabled them to function effectively in their day-to-day life under self-imposed limitations on relations with the world, and to survive and prosper in contemporary society as a separate, sharply identifiable, and highly sufficient community for more than 200 years. In itself this is strong evidence that they are capable of fulfilling the social and political responsibilities of citizenship without compelled attendance beyond the eighth grade at the price of jeopardizing their free exercise of religious belief.[20]

In this balancing of individual and community interest against that of the state, the court in effect recognizes an old distinction in the history of law, a distinction between customary law (consuetudines) and official law (leges).[21] That is, the court in this instance recognizes the primacy of the custom of the place over official law, since the state failed to show a rational and substantial interest.

Precedents to Court Opinions

This case suggests the possibility of litigation on the basis not only of the First Amendment, but also on a number of other legal bases which attempt to secure recognition of customary over official law--recognition of an individual's right to his language and culture.

The recognition of custom (consuetudines) is not without precedent in the history of American legal action, even with respect to schools. The Treaty of Guadalupe Hidalgo, effected between the United States and Mexico in 1848, stated in the original version of Article IX that "all ecclesiastics and religious corporations or communities, as well in the discharge of the offices of their ministry" will be protected from interference by the American government. The guarantee extends to "all temples, houses and edifices dedicated to the Roman Catholic worship as well as property destined to its support, or to that of schools, hospitals, and other foundations for charitable or beneficient purposes."[22]

This guarantee is a companion to a provision that the Mexicans, so electing, shall be incorporated "into the Union of the United States and be admitted . . . to the enjoyment of all the rights of citizens of the United States according to the principles of the Constitution."[23]

Although the United States amended the text, a protocol indicates that the new text is to be so construed as to include "all the privileges and guarantees, civil, political and religious, which would have been

possessed by the inhabitants of the ceded territory if [the original text] had been retained."[24] While this article does not guarantee a right to bilingualism in government or in education, it does entail two things: (a) it guarantees the neutral incorporation (i.e., without respect to language, traditions, or customs) of Mexicans, so electing, into the body politic of the United States; and (b) in its provision regarding institutions of religion, it guarantees protection to the institutions supporting the religious and customary life of the people. Recognition of the differences in custom and traditions, as well as in language, repeatedly occurs in the controversies surrounding the granting of statehood to Arizona and New Mexico. One document of the period states:

> . . . the people of New Mexico. . . . are not only different in race and largely in language, but have entirely different customs, laws, and ideals, and would have but little prospect of successful amalgamation.[25]

The treaty, while not explicitly guaranteeing perpetuation and protection of Mexican language, customs, and culture, recognized the special attributes of the people being incorporated into the United States.

It appears debatable whether the Treaty of Guadalupe Hidalgo guarantees protection of Mexican-American rights to language, culture, and customs. The Ninth Amendment to the federal Constitution, however, appears to provide substantial grounds for claiming such a right, grounds available to all U.S. citizens. This amendment provides that "the enumeration in the Constitution of certain rights, shall not be construed to deny or disparage others retained by the people."[26] The meaning of this amendment has not been clearly established. There appear to be essentially two ways of understanding it. They can be summarized as follows:

1. The first method of construing the Ninth Amendment is in essence to regard it as methodological in intent; it assumes that the first eight amendments are to be interpreted not as enumerating discrete and separate rights, but as constituting in themselves the source of law and to be interpreted so as to control and determine historically novel legal problems.[27]

2. The amendment can be taken as securing the fundamental and inherent rights of persons that are neither enumerated in the Constitution nor ceded to the federal government, or, with the addition of the Fourteenth Amendment, to the states. Further, one commentator has argued that the Ninth Amendment was intended to protect unenumerated rights, not only as they have now appeared but also as such rights may appear as history and the future unfold: "As the race becomes more evolved, and as the respect for the dignity of human life increases; as we become more intelligent and spiritual beings, then we shall learn more of the fundamental truths of human nature."[28]

While these methodological considerations are of great import and significance, it appears sufficient for now to note that both can be used to construct arguments securing for the individual a right to his own language (including here not only its verbal components but the associated kinesic and gestural systems) and to his own culture, except in instances in which the state can demonstrate an overriding and compelling interest. The Ninth Amendment, using the second method of interpretation, sometimes recognizes the superiority of custom over official law. Thus, in his opinion in *Griswold* v. *Connecticut*, Justice Goldberg interprets the Ninth Amendment so as to find protection of the general right of privacy and particularly the privacy of marital intercourse. The sources of this right are two: "the traditions and [collective] conscience" of the people and a theory of "fundamental personal rights":

> In determining which rights are fundamental, judges are not left at large to decide cases in the light of personal and private notions. Rather they must look to the "traditions and [collective] conscience of our people" to determine whether a principle is "so rooted [there] . . . as to be ranked as fundamental." . . . "Liberty" also "gains content from the emanations . . . of specific guarantees" and "from experience with the requirements of a free society."[29]

The significance of this interpretation of the Ninth Amendment lies in its recognition of the legal force of customs and traditions. Further, in a widely publicized decision regarding obscenity, one of the tests is whether the material under consideration is obscene when community standards are applied. Finding that a national standard is hypothetical and unascertainable, the court resorted to recognition of the customs and mores of the community.[30] Thus, what is obscene in Sioux City may or may not be obscene in San Francisco, and may or may not be obscene in Burlington, Vermont.

If a court can write that the "law should be construed in reference to the habits of business prevalent in the country at the time it was enacted" and "that the law was not made to create or shape the habits of business but to regulate them, as then known to exist"[31] then certainly, with respect to language and culture, education laws must be so construed as to protect the linguistic and cultural habits of individuals and groups.

Thus, in the absence of a compelling state interest, the state must be *neutral* with respect to language and culture. Any other position requires development of arguments demonstrating the state's interest in depriving an individual (or a collection of individuals) of his or her most private habits, customs, and mores, an interest that could hardly be said to secure benign effect. The concept of neutrality is not foreign to our traditions or judicial opinions. The implications

of the wholesome neutrality of which the Court spoke in *Abington School District* v. *Schempp* are clarified in the following passage from Justice Clark's opinion:

> . . .it might well be said that one's education is not complete without a study of comparative religion or the history of religion and its relationship to the advancement of civilization. It certainly may be said that the Bible is worthy of study for its literary and historic qualities. *Nothing we have said here indicates that such study of the Bible or of religious when presented objectively as part of a secular program of education may not be effected consistent with the First Amendment.*"[32]

Here the court requires that the state be neutral with respect to one of the significant features of culture--religion; the state can neither promote nor disparage a particular religion. Applied to the language and cultural policy of the state, at least in its educational system, the principle enunciated here would be: There is nothing to prevent the teaching of dialects, languages, or cultures other than those possessed by the student so long as they are presented *objectively* as instruments or understandings useful, and perhaps necessary, in social and political intercourse. The corollary to this principle is that no person can be differentially incorporated into the school's activities (or society in general) on the basis of nonpreferred linguistic or cultural attributes. That is, language or culture can neither be denied nor disparaged, nor can a citizen be denied benefits because of either. The implication of this argument is that the licensing and certification of teachers must be *neutral* with respect to language and culture, just as it is presently neutral with respect to religion.

Obviously, a requirement of neutrality cannot be imposed on a specific school in a particular community. Schooling is in its essence a cultural activity. This observation, however, need not undermine an argument for cultural neutrality at the state level. Here the obscenity case referred to above is helpful. In that case the court invoked community standards to test whether materials were obscene. This suggests that variation in cultural patterns, including language and other customs, can be responded to at the local level. Just as a national standard for obscenity is hypothetical and unascertainable, so a national or state standard for the conduct and content of education is hypothetical and unascertainable. Our historic and illusory search for the universal master teacher and curriculum ought to be sufficient evidence to support such an observation. At the local level, as opposed to the state level, it is permissive, indeed obligatory, that the schools be responsive to the personhood of the student and to community standards--its traditions, collective conscience, mores, and habits. Indeed, without being responsive to the latter, education, in any meaningful sense may well be impossible. Wax assists in clarifying this when he speaks of his experiences on the Pine Ridge Reservation:

> In these classrooms [of Indian children] what I and other observers have repeatedly discovered is that the children simply organize themselves so that effective control of the classroom passes in a subtle fashion into their hands. . . . [If the observer of such classrooms] knows what to look for, he will perceive that the reticence of the Indian children has nothing to do with personal shyness and everything to do with the relationship between the child and his peers in that classroom. For [they] exert on each other a quiet but powerful pressure so that no one of them is willing to collaborate with the teacher. . . . What the children primarily resist is the authority of the teacher and his [or her] intervention into their collective lives.[33]

In the situation Wax describes, education cannot properly be said to be going on. Rather this situation suggests that to create the conditions necessary for what can truly be considered education it is necessary to relate to the character of the indigenous collective life of these children, the notions of authority and social organization that they bring with them into the educational context. Further, there is an emerging body of research suggesting that learning is at least facilitated, and perhaps made possible, when the didactic modes of the educational institution are consonant with the didactic modes employed in settings other than those of formal education.[34] Wax's observations and other research suggest that the educational personnel and the organization of the educational enterprise must be consonant with the cultural patterns of the community in which the students live, if they are to be effective.

The implications of this argument for educational personnel licensing and, more generally, the conduct of state-supported education, appear to be numerous and profound. An adequate licensing system would almost of necessity consist of two tiers.[35]

1. The first tier would license a person to teach on the basic of demonstrated competence in an intellectual, cultural, or vocational area. This permission on the part of the state would enable an individual to teach something of conceivable worth and value to someone or some group, with the notions of worth and value broadly interpreted.

2. The second tier would certify that a person has demonstrated competence in teaching children in a specific kind of neighborhood or community. The person would be certified as having the capacity to affect benignly the achievement and well-being of children in that neighborhood.

The crucial principle at the second tier is that of benign influence or effect. Benign influence or effect includes the enhancement of the individual student's competence--physical, intellectual, psycho-

logical, and vocational--and indirectly the decency and humaneness of the community. This interpretation of benign influence is consistent with the Court's considerations in *Yoder* v. *Wisconsin,* in which it relied heavily on the self-sufficient character of the Amish community.

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Preparing Educational Personnel

We can now turn to the question of how educational personnel might be prepared. It takes no special perception for an observer to discover that in the United States there are few communities comparable to the Amish--few communities so cohesive, so self-sufficient, so decent and humane on its own terms. Indeed, most communities presently appear to be characterized by various degrees of alienation, by troubling and disrupting discontinuities and incompatibilities between and among significant segments of their primary activities--in work, education, and the expressive and imaginative life. Thus, the character of educating educational personnel has to be such that it enables them to assist in a community-building process, a process that may well have to be undertaken in order to secure benign effect on the achievement and well-being of the student.

The foregoing considerations suggest the need for considerable reconstruction of the education of educational personnel. One possible model would have the following features:

1. The second tier of the licensing process outlined above requires an "examining school," in which the individual would be evaluated from several perspectives--those of administrators, peers, parents, and community people--for competency to teach in a specific kind of neighborhood or culture.

2. In order to assist candidates to prepare for this level of certification, programs might be developed--though completion of them would not be mandatory--and perhaps conducted by the examining school. These programs might well have the following features:

    a. Learning and education that would assist prospective teachers to "anthropologize" the specific community or region in which they are teaching or in which they intend to teach.

    b. Learning and education that would provide tools to assist in responding to and bridging discontinuities in work, education, and the expressive and imaginative life of the community.

This learning and education would be heavily experiential and would include:

1. Experience in a range of institutions or sectors of the community other than schools in order to develop understanding of the ways in which these institutions produce trouble for one another and the community, or the ways in which they collaborate in the production of actions leading to realization of commonly shared goals and aspirations;

2. Experience and theoretical assistance in attending to the private and shared mythologies held by members of the community or region regarding work, education, and play. This would involve careful work analyzing the rule structures and value postulates implicit in primary community activities in these areas;

3. Experience and theoretical assistance regarding the role of the imaginative and expressive life of individuals and communities in celebrating the past and constructing a vision of the future, both private and public, a celebration and a vision studied in relationship to work and education, particularly as it provides cognitive structures for interpreting both;

4. Experience leading to acquisition of skills and tools to deal with discontinuities and alienation, probably in the form of looking at studies of societies and groups that have successfully overcome these sorts of difficulties and of experience in contexts in which discontinuities and alienation exist, with assistance to address them.

Such a model appears essential in developing an adequate sense or understanding of what benign effect on an individual and community might be. These features are also essential in developing the skills and competencies necessary to simultaneously assist in a community-building process and benignly affect individual students.

The implications of the argument I have developed hold out a vision of the future and, consequently, of education that runs directly counter to Holmes' assertion that, *for the sake of progress,* "backward communities need not be made more happy" but "to be freed from their backwardness." Certainly Cartter's "attributes of being which are associated with the cultured gentleman" are, but in a few and rare instances, clearly irrelevant, if not detrimental and destructive. But I would urge that acting on the implications of the argument I have laid down would promote the well-being and the improvement of the character of our civic life, a theme running through the various education cases.[36]

While I have suggested a configuration of legal constraints within which education will have to be conducted in the future, there remains a rather troublesome problem that has its source in *Brown* v. *Board of Education* and its progeny. The problem is illustrated in a recent district court decision in *Hunnicutt* v. *Burge*.[37] In this case, twenty-nine white taxpayers in Georgia initiated litigation against the Board of Regents of the University of Georgia, claiming that Fort Valley State, a state-supported institution with an exclusively black student body, was academically inferior and inherently and unlawfully unequal. The court found for the plaintiffs and ordered the Board of Regents to "eliminate the design for black students."[38] Further, the court observes that the academic inferiority of Fort Valley State and its substantial production of teachers, who are subsequently licensed by the state, means that students in public schools in the state of Georgia are being denied equal protection under the state's laws governing the licensing of teachers.

The court here is relying heavily on the principles enunciated in *Brown*, and its application of them appears to invalidate and undermine the observations and arguments presented earlier in this paper and to contradict other court decisions. The problem emerging here is how to secure equal educational opportunity and at the same time achieve the conditions necessary for what might be properly called education or, in other words, make it possible to secure equal opportunity and simultaneously initiate a community-building process and enable teachers to affect students benignly. This problem seems to have its source in an unworkable notion of "equality." For "equality" is used in this context analogously with "equality" in mathematical language.

For a variety of reasons such a notion appears inadequate whether one seeks to measure equality in terms of inputs (as in accrediting and certification) or in terms of output (as in standardized testing). And our experience with remedial or compensatory education suggests that the current concept of equality at a practical level is unworkable, if not destructive. It seems to me that instead of employing a mathematical notion of equality, we might well, following the lead of Hawkins, employ instead another mathematical analogy, that of commensurability. Recognizing that human beings are congenitally incommensurable--never indistinguishable or identical--Hawkins argues:

> The postulate of incommensurability . . . takes children as congenitally varied rather than "unequal," and raises questions about the *differential* effect of earlier environment in relation to the kinds of learning it has supported or inhibited. It underlines the importance of local and dependent curricular and instructional choices, to make the curricular spiral tangent at many points to the individual lives of children, to the educative resources of *their* total environment which *they* know or can be helped to discover. . . . This proposition is no less important for the

education of "advantaged" children; it is only at present less in the political focus.[39]

He continues:

> But the meaning of incommensurability is that diverse children *can* attain to a common culture--a common world of meanings and skills, of intellectual tools, moral commitments, and aesthetic involvements. Individual development *can* complement individual differences, but only through a matching diversity of learning styles and strategies. Children can learn equally, in general, only as they learn differently. The more constraints there are toward single-track preprogrammed instruction, the more predictably will the many dimensions of individual variety--congenitally and individually evolved--express themselves as a large rank-order variance in learning.[40]

He concludes his exploration of the notion of incommensurability in the following way:

> Human beings are valued within a community for their useful differences . . . --as sources or resources of skill, of aesthetic expression, or moral or intellectual authority. It is not difference as such which we value, but individuality--the unique personal style and synthesis which interests us in each other as subjects of scrutiny, of testing, of emulation, or repudiation. Recognition of individuality completes what I mean by the postulate of incommensurability. The character which members of our own species possess--what we term individuality--implies neither dominance nor identity, but equivalence within a domain of relations sustained by individual diversity. If the old word *equality* should be used in this sense, it is the equality of craftsmen working at different tasks and with different skills, but with plans and tools congruent enough to provide endless analogies and endless diversions. Or, it is the equality of authors who read other authors' books but must each, in the end, write his own.[41]

"Equal opportunity" in light of the postulate of incommensurability requires the provision of a wide range of diversity in that opportunity. Thus, judgment concerning equality among institutions and the competency of individual teachers can be formulated against no mere hypothetical and unascertainable national or statewide standard of equality of inputs or outputs. Such formulations must, rather, be formulated against the prerequisites for the sufficiency of the individual and decent and humane communities.

NOTES

1. Holmes, Roy H. *Rural Sociology: The Farm Family Institution.* New York: McGraw-Hill, 1932, pp. 405-6.

2. Cartter, Alan. "University Teaching and Excellence." In *Improving College Teaching,* ed. Calvin B. T. Lee. Washington, D.C.: American Council on Education, 1967, p. 160.

3. Byrd v. Begley, 9C S. W. 2nd. 371 (1936).

4. Hopkins, John O. *Basic Legal Issues in New York State on Teacher Certification.* Lincoln, Nebraska: Study Commission on Undergraduate Education and the Education of Teachers (University of Nebraska at Lincoln), 1973, p. 7.

5. Griggs v. Duke Power Company 401 U. S. 424 (1971).

6. The EEOC guidelines can be found in the *Federal Register* 35, no. 149 (August 1, 1970), pp. 12333 ff., or in the *Code of Federal Regulations* 29CFR, part 1607. See also Michael J. Malbin, "Employment Report: Proposed Federal Guidelines on Hiring Could Have Far-reaching Impact," in *National Journal Reports* 5, no. 39 (September 29, 1973), pp. 1429-34.

7. The memorandum is from David Frohnmayer, dated November 8, 1972, p. 2, item 3. "The Task Force hopes that its explanation of the Ph.D. in relation to faculty qualifications will serve as a helpful model for similar institutional statements on other degrees that a college or university may wish to claim as BFOQ'a (bona fide occupational qualifications)."

8. Huff, Sheila. "The New Realism in Employment Practices: Implications for Education of Title VII of the Civil Rights Act of 1964." Working Draft. Syracuse, New York: Educational Policy Research Center, Syracuse University Research Corporation, September 1973.

9. Griggs v. Duke Power Company 401 U. S. 433 (1971).

10. Shimberg, Benjamin, Barbara F. Esser, and Daniel H. Kruger. *Occupational Licensing Practices and Policies.* Washington, D.C.: Public Affairs Press, 1973, p. 202.

11. U.S. v. Georgia Power Company 474 F2d 906 at 915.

12. Robinson, William. "The Power of Competency-Based Teacher Education: Views of a Civil Rights Lawyer." In *The Power of Competency-Based Teacher Education.* Report of the Committee on National Program Priorities in Teacher Education, ed. Benjamin Rosner. Boston: Allyn and Bacon, 1972, pp. 278-9.

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13. "Minutes of the Executive Board Meeting." *College Composition and Communication* 23, no. 3 (October 1972), p. 325.

14. Lau v. Nichols 414 U.S. 563 (1974).

15. U.S. District Court (N. D. California, Civ. No. C-70-627 LHB, May 26, 1970) unreported; for appellate court decision see 483 F 2d 791 (1973). Quoted from memorandum for U. S. as Amicus Curiae in Lau v. Nichols in U.S. Court of Appeals for Ninth Circuit, p. 2.

16. U.S. v. State of Texas 342 F. Supp. 24 (1971) at 26 and 28.

17. U.S. Department of Health, Education, and Welfare, U. S. Office of Education. *The Education Professions 1968.* A Report on the People Who Serve OUr Schools and Colleges. Washington, D.C.: U. S. Government Printing Office FS5.258:58032, 1969, p. 42.

18. Wisconsin v. Yoder 406 U. S. 205 (1972) at 223.

19. Ibid.

20. Ibid. at 224.

21. On the history of the distinction between custom and law, see Paul Vinogradoff, *Custom and Right,* Cambridge: Harvard Univ. Press, 1925, particularly chap. 2.

22. Telefact Foundation in cooperation with the California State Department of Education. *El Tratado de Guadalupe Hidalgo, 1848.* (no city given) 1968, p. 58.

23. Ibid., p. 56.

24. Ibid., p. 108.

25. Ibid.

26. U.S., *Constitution,* Amend. 9. The invocation of the Ninth Amendment to protect one's right to his or her own language is suggested by Klotz' essay, "The Honest and the Glorious," in *El Tratado de Guadalupe Hidalgo, 1848,* p. 24; and in Anthony Garvin, "Educational Policy Implications of a Legal Theory of Public vs. Private Benefits," Discussion Draft, Syracuse, N.Y.: Educational Policy Research Center (October 1972). Page 16 notes that "the discovery of the ninth amendment by legal theorists could have an enormous impact on educational policy." A list of commentators on the Ninth Amendment follows. Only one wrote after Griswold v. Connecticut: Knowlton H. Kelsey, "The Ninth Amendment of the Federal Constitution,"

11 *Indiana Law Journal* 309 (1936). The others are: Bennett Patterson, *The Forgotten Ninth Amendment*, Indianapolis: Bobbs-Merrill, 1955; Mitchell Franklin, "The Relation of the Fifth, Ninth and Fourteenth Amendments," 4 *Howard Law Journal*, 170 (1958); Note, "The Uncertain Renaissance of the Ninth Amendment," 33 *University of Chicago Law Review* 814 (1966); Redlich, "Are There Certain Rights . . . Retained by the People?" 37 *N.Y.U. Law Review* 787 (1962); Mitchell Franklin, "The Ninth Amendment as a Civil Law Method and Implications for Republican Form of Government. . . ." 40 *Tulane Law Review* 487 (1966).

27. See Franklin, "The Ninth Amendment as a Civil Law Method. . . ."

28. Patterson, *The Forgotten Ninth Amendment*, p. 51.

29. Griswold v. Connecticut 381 U. S. 479 at 493.

30. Miller v. California 93 Sup. Ct. 2607 at 2619.

31. Patterson, *The Forgotten Amendment*, p. 56.

32. Abington School District v. Schempp 374 U. S. 203 (1963) at 225.

33. Study Commission on Undergraduate Education and the Education of Teachers. "How Should Schools Be Held Accountable?" In *Education for 1984 and After*, eds. Olson, Freeman, and Bowman. Lincoln, Nebraska: Study Commission on Undergraduate Education and the Education of Teachers (University of Nebraska at Lincoln), 1971, pp. 63-4.

34. Sanday, Peggy R., "Cultural and Structural Pluralism in the U.S." Unpublished position paper prepared for the Committee on Cultural Pluralism of the Study Commission on Undergraduate Education and the Education of Teachers.

35. Two-tier or two-step licensing systems of a different sort have also been proposed. See Public Education Association of New York City, "Memorandum Regarding Reform of Personnel Selection Procedures for New York City Public School System by Establishment of a New Two Step Performance Based Certification System," a memorandum prepared at the request of the New York State Assembly Education Committee, September 15, 1973; and see Metropolitan Research Center, "A Possible Reality of High Academic Achievement for the Students of Public Elementary and Junior High Schools of Washington, D.C. (1970)," reprinted in *Committee Print*, Select Committee on Equal Educational Opportunity, U.S. Senate, 91st Congress, 2nd Session, September 1970.

36. The efforts of the Special Committee on Youth Education for Citizenship of the ABA should not be overlooked in this connection. This Committee, under the direction of Joel Henning, seeks to

foster development and implementation of law-related curricula and teaching practices designed to provide students with the intellectual skills and attitudes necessary for responsible and effective citizenship in an American society governed by rule of law.

37. Hunnicutt v. Burge 356 F. Supp. 1227 (1973).

38. Ibid. at 1238. For commentary on a similar situation--Black House and Casa de la Raza in the Berkeley Experimental School District--see Susan Frelich Appleton, "Alternative Schools for Minority Students: The Constitution, the Civil Rights Act, and the Berkeley Experiment, " 61 *California Law Review* 858 (1973).

39. National Society for the Study of Education. "Human Nature and the Scope of Education." In *Philosophical Redirection of Educational Research*. 71st Yearbook of the National Society for the Study of Education, Part 1, ed. Lawrence G. Thomas. Chicago: National Society for the Study of Education, 1972, p. 301.

40. Ibid., p. 302.

41. Ibid., p. 303.

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